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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JAMES CLETIS SEGARS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JEFFREY E. KIMMELL
Counsel of Record
Attorney for Petitioner
218 West Washington, Suite 600
South Bend, IN 46601
(219) 232-7410

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Whether the Seventh Circuit's decision affirming the district court's denial of Segars' § 2255 petition, conflicts with this Court's precedent, established in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 235 (2000), requiring allegations of every fact which is legally essential to the punishment to be inflicted to be charged by indictment and presented to a jury for a finding of guilt or innocence?

Whether the district court had jurisdiction to enhance Segars' sentence under the sentencing guidelines based upon the court's post-trial determination that large quantities of drugs handled by a conspiracy were reasonably foreseeable to Segars, even though the drug quantities were never alleged in the indictment against Segars?

PARTIES TO THE PROCEEDING

The parties to the proceeding are James C. Segars, petitioner herein and appellant/defendant below, and the Government of the United States, respondent herein and appellee below.

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The indictment against Segars alleged that he conspired to distribute 500 grams or more of cocaine, and that he possessed cocaine in amounts totaling 2.111 kilograms. The evidence at trial showed that Segars received cocaine from Detroit and sold it in South Bend, Indiana. In calculating Segars' sentence, the district court determined that Segars was accountable under the sentencing guidelines for all of the cocaine distributed by the Detroit based conspiracy (40 to 50 kilograms). The drug quantities determined by the court were never presented to, nor determined by the jury. The court's findings on drug quantities after the trial resulted in an enormous increase in the maximum allowable sentence that Segars could receive under the sentencing guidelines.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, James Segars ("Segars"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"), in the case of *James Cletis Segars v. The United States*, Case No: 01-1251, as that judgment pertains to Segars' attack on his sentence pursuant to 28 U.S.C. § 2255.

OPINIONS BELOW

The Seventh Circuit's decision, which was decided with an opinion on July 2, 2001, is not reported, and appears at Appendix A.

The Seventh Circuit affirmed the district court's order denying Segars' motion attacking sentence pursuant to 28 U.S.C. § 2255. The district court's order and memorandum are unpublished, and appear at Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit was rendered final on August 31, 2001 when the Seventh Circuit denied Segars' Petition for Rehearing En Banc.

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution (emphasis added):

> No person shall be held to answer for a capital, or otherwise infamous crime, *unless on a presentment or indictment of a Grand Jury*, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, *without due process of law*; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution (emphasis added):

> In all criminal prosecutions, *the accused shall enjoy the right to a speedy and public trial, by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, *and to be informed of the nature and cause of the accusation;* to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On January 23, 1991, Segars was charged by a three count indictment. Count 1 alleged a conspiracy to distribute 500 grams or more of cocaine, beginning the fall of

1988 and ending January 18, 1991; count 2 alleged possession with intent to distribute less than 500 grams of cocaine on December 19, 1990; and count 3 alleged possession with intent to distribute less than 500 grams of cocaine (54.1 grams) on January 18, 1991, in violation of Title 21 U.S.C. § 846 and § 841(a)(1). (No penalty provision for § 841(a)(1) charged).

On March 27, 1991, Segars was charged on a superseding indictment with count 1, conspiracy to distribute 500 grams or more of cocaine from June of 1987 thru January 18, 1991, in violation of Title 21 U.S.C. § 846 and § 841(a)(1) and various overt acts. Out of the overt acts of count 1, Segars was charged with seventeen counts of possession of cocaine in violation of § 841(a)(1) and 18 U.S.C. § 2 (the total amount of cocaine alleged equaled 2.111 kilograms); one count of money laundering, 18 U.S.C. § 1956; six counts of interstate travel in aid of unlawful activity, 18 U.S.C. § 1952(a)(3) § 2; one count of using and carrying a firearm in relation to a drug trafficking crime, Title 21 U.S.C. § 924(c)(1). (No penalty provision for § 841(a)(1) charged).

At issue in Segars' trial was the testimony of a government witness named Salwan Asker. Asker did not testify before the Grand Jury which returned the indictment against Segars, nor was the substance of his testimony charged in the indictment. Asker was not a defendant in the case, nor charged as a co-conspirator. However, over the objections of Segars and his co-defendants, Asker testified that he sold large amounts of cocaine to Emanuel Newman and Conchita Washington. Eighteen months earlier, Asker's testimony, which was used against Segars at trial, was presented to a grand jury

which chose not to indict Washington and Newman at that time. (T.T. Vol IV, pp. 359-61, T.T.; Vol VIII pp. 1359-60; Appendix E, Addendum to Presentence Report.).

On June 22, 1991, Segars was convicted by a jury on all counts of the indictment.

After trial, U.S. Probation Officer Lon P. Smith ("Smith") prepared the Presentence Report, the findings of which were adopted by the sentencing court over Segars' objection. In his report, Smith concluded that Segars' base level offense under the sentencing guidelines should be 34. This level was based upon Asker's testimony. An additional 3 levels were assessed based on Smith's determination that Segars was a supervisor in the conspiracy. (Appendix E). According to the Presentence Report, absent the uncharged allegations stemming from Asker's testimony, Segars offense level could have been as low as 26. (Appendix E).

Segars objected to the probation officer's recommendations. (Appendix E). However, the district court sentenced him in category III, level 37, to 327 months incarceration, and added an additional 60 months for Segars' firearm conviction.

Segars appealed his 387 month sentence. The Seventh Circuit Court of Appeals affirmed the district court. *United States v. Newman*, 9 F.3d 113 (7th Cir. 1993) (unpublished).

In 1994 Segars filed his initial § 2255 Petition, which the district court denied. The Seventh Circuit Court of Appeals affirmed the district court with the exception of Segars' firearm conviction, which was overturned and

remanded in light of *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). *Segars v. United States*, 114 F.3d 1192 (7th Cir. 1997) (unpublished).

Upon remand, the district court vacated the firearm conviction, and resentenced Segars by increasing his offense level to 39 and reducing his criminal history to category II, because two prior misdemeanor convictions had been vacated since the date of Segars' original sentencing. The district court imposed a 353 month sentence, in category II, at level 39.

Segars appealed this sentence, and the Court of Appeals remanded the case back to the district court once again. See *United States v. Segars*, 165 F.3d 34 (7th Cir. 1998) (unpublished).

Upon remand, the district court sentenced Segars to 315 months, criminal history category I, level 39. Segars appealed again, and this time the Court of Appeals affirmed the 315 month sentence. *United States v. Segars*, 182 F.3d 923 (7th Cir. 1999) (unpublished).

On September 20, 2000, Segars filed a Petition to consider a second or successive Petition for collateral review under § 2255. The Seventh Circuit dismissed Segars' application as unnecessary, because this was considered the first collateral attack on the new sentence. (Appendix D).

On November 2, 2000, Segars filed a § 2255 Petition alleging violations of his fundamental rights protected by the Fifth and Sixth Amendments, and his 315 month sentence.

On January 11, 2001, the district court denied Segars' § 2255 Petition, without addressing Segars' Sixth Amendment claim.

Segars subsequently obtained a Certificate of Appealability authorizing an appeal.

On April 2, 2001, Segars appealed to the Seventh Circuit Court of Appeals. On July 2, 2001, the Circuit Court affirmed the district court's denial of Segars' § 2255 Petition.

Segars filed a timely Petition for Rehearing En Banc, which was denied on August 31, 2001.

The factual evidence presented to the jury established that Segars possessed 54.1 grams of cocaine. (T.T. Vol. IV pp. 549, count 36). This amount of cocaine, given a criminal history of category I, would place Segars in the sentencing guideline range for level 16, 21-27 months. If the same 5 level enhancements which the district court applied to Segars' first and second sentences were applied to the guideline level for the actual amount of cocaine that was presented to the jury, then Segars' final offense level would be 21, with a guideline range of 37-46 months.

The total amount of cocaine which Segars was alleged to have possessed in the indictment was 2.111 kilograms. However, the jurors were instructed that they need not find that Segars actually possessed the amounts specified in the indictment, and that they should find Segars guilty if they believed he possessed any "measurable amount" of cocaine. (T.T. Vol. XIII pp. 2224, 2225).

Segars' § 2255 Petition contends that he has been denied his right to due process under the Fifth Amendment, and of his rights to trial by jury and to be informed of the charges against him guaranteed by the Sixth Amendment. Segars' 315 month sentence is based upon drug quantities that were never contained in the indictment against him, nor presented to the jury for a determination of his guilt or innocence. Segars contends that even though his actual sentence was less than the 30-year statutory maximum under § 841(b)(1)(C), his actual maximum sentence was set by the sentencing guidelines. Because the maximum sentence established under the sentencing guidelines was dependent upon amount of cocaine attributed to Segars, the government should have been required to obtain an indictment which alleged the full amount of cocaine for which they sought to hold him accountable. Furthermore, Segars was entitled to have a jury determine his guilt or innocence on the full drug quantity which established the range of penalties Segars faced.

REASONS FOR GRANTING THE WRIT

In affirming the district court's denial of Segars' § 2255 Petition, the Seventh Circuit reasoned that because Segars faced a statutory maximum sentence of thirty years regardless of the amount of cocaine involved, his sentence of 315 months did not violate any of his constitutional rights as recently enumerated in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 235 (2000). The Seventh Circuit did not agree that Segars had the right to be charged by indictment, and to have a trial by

jury, regarding the quantity of drugs for which he was ultimately sentenced.

The Seventh Circuit's position conflicts with *Apprendi*, as well as recent case law from other district courts, and other Circuit Courts.

According to the Sixth Circuit Court of Appeals, the basic holding of *Apprendi*, is two-fold:

> *first*, that courts must count any "fact" that increases the "penalty beyond the prescribed statutory maximum" as an element of the offense "except for one important exception,": i.e., "the fact of a prior conviction;" and *second*, that it "is unconstitutional for a legislature" to treat "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" as mere sentencing factors, rather than facts to be established as elements of the offense.

United States v. Ramirez, 242 F.3d 348, 350 (6th Cir. 2001).

In *Ramirez*, the Sixth Circuit overturned a mandatory minimum sentence imposed under 21 U.S.C. § 841(b)(1)(B), which was based upon the district court's determination of a quantity of cocaine which was neither charged by indictment nor presented to a jury.

In *United States v. Strayhorn*, 250 F.3d 462 (6th Cir. 2001), the Sixth Circuit again held that *Apprendi* should be applied to grant relief to any defendant who was sentenced to a greater range of penalties based upon drug quantities not charged by indictment nor presented to a jury, even if the actual sentence did not exceed the legislatively prescribed default statutory maximum.

Like *Ramirez* and *Strayhorn*, the district court dramatically increased the range of penalties Segars faced by a post-trial determination of drug quantities neither charged by indictment, nor proven to a jury beyond a reasonable doubt.

Segars' true potential minimum and maximum sentences were determined by the sentencing guidelines, which were linked directly to the drug quantities for which Segars was to be sentenced. In *United States v. Norris*, 143 F.Supp.2d 243 (E.D.N.Y. 2001), the district court held that *Apprendi* applies where a sentencing judge has increased the range of punishment based on the judge's own findings by a preponderance of the evidence, even if the sentence imposed does not exceed the maximum that Congress fixed by statute for the crime. *Norris* correctly reasons that "*Apprendi* was discussing a state case that had no guideline system such as that in current federal law." *Norris*, 143 F.Supp.2d at 248. And that:

> In both the State case of *Apprendi* and federal drug cases defendant is deprived of the right to due process of law and the right to a speedy and public trial by an impartial jury. The deprivation is the same in the state cases as it is in the federal cases even though the deprivation is accomplished by a statute in the state cases and in the federal cases by "Guidelines" which are binding law.

Id. at 249.

A review of Segars' jury instructions raises further doubt regarding the legality of his sentence. In the instant case, the district court instructed the jury as follows:

> . . . the evidence in this case need not establish that the amount or quantity of cocaine was as alleged in the indictment, but only that a measurable amount of cocaine was in fact the subject of the acts charged . . . (T.T. XIII pp. 2224-25)

The jury instructions given by the district court completely withdrew the issue of drug quantities from the jury. Thus the jury's verdict represents only a finding that Segars possessed a measurable amount of cocaine. Nothing in the verdict can be construed as a finding that Segars should be criminally accountable for the massive drug quantity assessed by the district court.

The drug quantity was a material question in Segars' case. Failure to submit a question of materiality to a jury violates a defendant's Federal Constitutional Right to have a jury determine guilt of every element of the crime charged. See *United States v. Gaudin*, 515 U.S. 506, 132 L.Ed.2d 444, 115 S.Ct. 2310 (1995).

In this case, the district court attributed an additional 38 to 40 kilograms of cocaine to Segars at sentencing. The indictment did not hint that Segars could face the penalties associated with this amount of cocaine, and the jury was never given a chance to decide the issue. The testimony at Segars' trial established that he possessed 54.1 grams of cocaine. The indictment alleged that Segars possessed 2.111 kilograms. Each amount a far cry from the 40 to 50 kilograms for which the district court sentenced Segars.

It is clear that not all Federal Courts are applying *Apprendi* in a like manner. As a result, this case presents questions of significant importance – whether *Apprendi*

should be applied to the plethora of federal drug prosecutions in which sentencing courts greatly increase the penalty ranges established in the guidelines based upon findings that are not charged by indictment nor proven beyond a reasonable doubt to a jury.

Segars' sentence for drug quantities beyond those alleged in the indictment also raises jurisdictional concerns. This Court has long held that "an indictment found by a grand jury [is] indispensable to the power of the court to try the petitioner for the crime with which he was charged." *Ex Parte Bain*, 121 U.S. 1, 12-13 (1887), and that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960).

While the district court did not technically amend the indictment against Segars in this case, the end result in the sentence was the same. Segars was sentenced for a crime that he was never charged with, i.e., conspiring to distribute 40 to 50 kilograms of cocaine. Accordingly, the district court deprived Segars of the right to "answer" only for those crimes presented to the grand jury. See *Russell v. United* States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); *Cotton v. United States*, 261 F.3d 397 (4th Cir. 2001); *Longoria v. United States*, 259 F.3d 363 (5th Cir. 2001); *Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998).

CONCLUSION

Segars respectfully requests that this Court grant this petition for writ of certiorari to review the merits of the Seventh Circuit's decision below.

Respectfully submitted,

JEFFREY E. KIMMELL
Counsel of Record
Attorney for Petitioner
218 West Washington, Suite 600
South Bend, IN 46601
(219) 232-7410

APPENDIX A

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 17, 2001
Decided July 2, 2001

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

No. 01-1251

JAMES CLETIS SEGARS, *Petitioner-Appellant,* *v.* UNITED STATES OF AMERICA, *Respondent-Appellee.*	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 00 CV 681 Robert L. Miller, Jr. *Judge.*

ORDER

This appeal is successive to No. 99-1302, and the same panel retained it for decision. After examination of the briefs and the record, we have concluded that oral argument is unnecessary; accordingly, the appeal is submitted on the briefs and the record. Fed. R. App. P. 34(a). Cro. R. 34(f).

Mr. Segars was convicted in 1991 of one count of conspiracy to distribute "cocaine, a Schedule II Controlled Substance," seventeen counts of possession with intent to distribute "cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1)," and several other offenses which need not be set forth here. His current sentence of imprisonment, after modifications, is 315 months. He challenged his sentence (and conviction) by motion under 18 U.S.C. § 2255. The district court denied his motion, and we affirm.

In his motion Mr. Segars asserted that he had been denied due process and equal protection of the law. He relied on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and asserted that there had been no jury finding of the quantities of cocaine involved. Judge Miller decided that even assuming that *Apprendi* is retroactive as to collateral attack on a final judgment, it could not help Segars. We agree. Segars' conviction, regardless of the quantity of cocaine involved, subjected him to a term of imprisonment of not more than 20 years enhanced by his prior conviction for a felony drug offense to not more than 30 years. His term of 315 months is within the enhanced maximum, without any additional fact being charged or determined by a jury. *See U.S. v. Jones*, 245 F.3d 645, 650-51 (7th Cir. 2001). (Prior conviction need not be found as fact by a jury, and sentence below statutory maximum does not violate *Apprendi*.)

On appeal Segars renews an argument presented in his § 2255 motion, but not discussed by Judge Miller. He appears to believe that the term "listed chemical" in 21

U.S.C. § 841(f) is equivalent to the term "controlled substance" in § 841(a)(1); that cocaine is both a controlled substance and a listed chemical, that he has been convicted of violation of the two subsections, and that the five-year maximum in subsection (f) should apply to him. He has apparently failed to relate the definition of "listed chemical," which he cites, to the definition of "list I chemical" and "list II chemical," 21 U.S.C. § 802(33), (34) and (35). The indictment charged and he was convicted of possession with intent to distribute cocaine, a Schedule II Controlled Substance. His argument has no merit.

On appeal he also argues that § 841 is unconstitutional because its structure requires that facts causing increases in the statutory maximum be determined by the trial judge. He seems also to argue that *Apprendi* requires that facts which form the basis for enhancement under the Guidelines must be charged and determined by a jury. These arguments were not made before the district court, and were waived. *See Hernandez v. U.S.*, 226 F.3d 839, 841 (7th Cir. 2000) (that different Guideline levels under the statutory maximum depend on proof of facts does not make those facts elements of the offense).

The judgment appealed from is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

JAMES SEGARS, *Petitioner*	)	CAUSE NO. 3:00-CV-681RM (Arising from 3:91-CR-2(01)RM)
vs.	)	
UNITED STATES OF AMERICA, *Respondent*	)	

MEMORANDUM AND ORDER

James Segars comes before the court on a motion attacking his sentence under 28 U.S.C. § 2255. The petition arises in an odd procedural setting in that it is neither Mr. Segars's first petition nor a second or subsequent petition, and in that whatever relief Mr. Segars might be entitled to will not affect the length of his sentence.

Mr. Segars was convicted in 1991 of one count of conspiracy to distribute cocaine, 21 U.S.C. § 846, seventeen counts of possession with intent to distribute cocaine, 21 U.S.C. § 841(a)(1), six counts of interstate travel in aid of cocaine distribution, 18 U.S.C. § 1952(A)(3), one count of money laundering, 18 U.S.C. § 1956(a)(1)(A)(i), and one count of using a firearm in relation to a drug trafficking crime. 18 U.S.C. § 924(c). The court sentenced Mr. Segars to 387 months' imprisonment, the top of the sentencing range the court found to be applicable. The court of appeals affirmed in an unpublished opinion. *See United States v. Newman*, 9 F.3d

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113 (1993 WL 393130) (7th Cir. 1993). In 1994, Mr. Segars filed his first petition under § 2255. This court's denial of that petition was affirmed, except the court of appeals remanded for consideration of the conviction on the firearm count in light of the intervening decision in *Bailey v. United States*, 516 U.S. 137 (1995). *See Segars v. United States*, 114 F.3d 1192 (1997 WL 284628) (7th Cir. 1997).

On remand, the parties agreed that the conviction on the firearm count could not stand under *Bailey*. This court vacated that count of conviction, and unbundled the earlier sentencing package by increasing Mr. Segars's offense level by two levels (to level 39) to reflect the possession of the firearm, and by reducing his criminal history points by two (placing him in Category II) to reflect that two of his prior state convictions had been vacated. The court imposed a sentence of 353 months' imprisonment – twelve months below the top of the range. Mr. Segars appealed that sentence, and the government agreed that the court had erred in calculating Mr. Segars's criminal history category. The court of appeals remanded with directions for the court to impose a sentence drawn from criminal history category I, *see United States v. Segars*, 165 F.3d 34 (1998 WL 767144) (7th Cir. 1998), and the court imposed a sentence of 315 months – again, twelve months below the top of the range – and the court of appeals affirmed. *See United States v. Segars*, 182 F.3d 923 (1999 WL 511426) (7th Cir. 1999).

Mr. Segars now attacks his 315-month sentence. Because this is his first attack on that sentence, the government agrees with Mr. Segars that this is not a second or subsequent petition within the meaning of 28 U.S.C. §§ 2255 and 2244(b)(3)(A). *See Walker v. Roth*, 133 F.3d 454

(7th Cir. 1997). The government does not question the timeliness of this petition.

In each sentencing in this case, Count 1 (the conspiracy count) has been viewed as carrying a sentence of not less than five years nor more than forty years by virtue of the cocaine quantities involved in the conspiracy, 21 U.S.C. § 841(b)(1)(B), and each of the counts of possession with intent to distribute have been viewed as carrying a penalty of as much as thirty years' imprisonment because of Mr. Segars's prior felony drug conviction, 21 U.S.C. § 841(b)(1)(C). Without such aggravators, each of those counts would carry a maximum term of imprisonment of twenty years. 21 U.S.C. § 841(b)(1)(C). In applying the sentencing guidelines, the court found that Mr. Segars was responsible under the "relevant conduct" provision, U.S.S.G. § 1B1.3, for the handling of forty to fifty kilograms of cocaine.

This time, Mr. Segars hangs his hat on *Apprendi v. United States*, 120 S. Ct. 2348 (2000), which held that any factor that allows a sentence in excess of the statutory maximum is an element of the offense, to be proven beyond a reasonable doubt to the trier of fact. That includes any drug quantity that allows a sentence in excess of twenty years under 21 U.S.C. § 841(B). *See United States v. Nance*, No. 00-1836, 2000 WL 1880629 at *4 (7th Cir. Dec. 29, 2000). Mr. Segars does not articulate clearly the relief he seeks, but he contends that his sentence, which he sees as being grounded in drug quantities not found by his jury, is illegal under *Apprendi*.

The first question ordinarily would be whether *Apprendi* applies to Mr. Segars's case. It can be said with

confidence that it would not apply (at least under current law) were this treated as a second or successive petition, *see Talbott v. State of Indiana*, 226 F.3d 866, 869 (7th Cir. 2000), but the government agrees that this is Mr. Segars's first collateral attack on this sentence (though it is not his first collateral attack on these convictions, leaving the court less certain than the government that this is the proper court for this petition. *See Walker v. Roth*, 133 F.3d at 455 ("Of course, had Walker sought to challenge aspects of his conviction the district court would have been correct in dismissing his petition as successive.")). The court need not resolve the retroactivity issue here, though, because *Apprendi* would not, even if retroactive, provide Mr. Segars with relief.

Apprendi holds that if a defendant is to be sentenced to something in excess of the statutory maximum based on some distinguishing fact, the distinguishing fact is an element of the offense punishable by the greater sentence, and so (in the event of trial) must be proven to the fact-finder beyond a reasonable doubt. Mr. Segars understands that he is serving 315-month sentences on counts that accommodate sentences of more than 240 months (20 years) only if he is proven beyond a reasonable doubt to have possessed a certain type of controlled substance in certain quantities – findings his jury was never asked to make. He believes that under those circumstances, he cannot be sentenced to 315 months on each count. For at least two reasons (and non-retroactivity of *Apprendi* certainly might provide a third), his argument does not result in any reduction in his sentence.

First, as the government points out, 21 U.S.C. § 841(b)(1)(C) authorizes a sentence of as long as thirty

years if a person convicted under 21 U.S.C. § 841(a) has a prior felony drug conviction, and that provision (not the drug quantity) provided the basis for treating the counts of possession with intent to distribute as carrying thirty-year maximums. Mr. Segars was convicted under § 841(a), and was convicted of a felony charge of dealing in a controlled substance (LSD) in 1983, for which he was placed on two years' probation. *Apprendi* seems no less applicable to enhancements based on prior criminal convictions, but Mr. Segars has raised no challenge to that prior conviction (indeed, he has been sentenced several times in this case alone without disputing it), and it is clear beyond a reasonable doubt that a rational jury would have found Mr. Segars to have had a prior felony drug conviction. Under this reading of the law, the maximum sentence on each of his convictions under § 841(a) is thirty years rather than twenty, and his 315-month sentence falls gracefully within that maximum.

More fundamentally, though, Mr. Segars was not sentenced to more than the statutory maximum in any practical sense, because even if he faced no more than twenty years' imprisonment on any count (on the ground that the jury was asked to find drug quantities or prior convictions), *Apprendi* takes no stand on consecutive sentencing. After the conviction on Count 37 was vacated, Mr. Segars stands convicted on eighteen drug counts, each of which (even by Mr. Segars's reckoning) carried a maximum sentence of at least twenty years' imprisonment. But for the sentencing guidelines, then, the law allowed the court to sentence Mr. Segars to eighteen consecutive

twenty-year sentences, or 360 years. *Apprendi*, if applicable at all, stands for the proposition that the drug quantities cannot be used to sentence Mr. Segars to more than 360 years' imprisonment unless the jury finds those quantities to have been proven beyond a reasonable doubt; *Apprendi* does not say that a sentencing court must disregard seventeen counts of conviction and sentence on only one count.

Mr. Segars's protection against a 360-year sentence springs not from *Apprendi*, but from the sentencing guidelines Mr. Segars's most recent sentencing range (offense level 39/criminal history category I) is 262 to 327 months' imprisonment – all of which exceeds the 240-month (twenty-year) maximum that Mr. Segars posits for each count of conviction, but which also falls well short of the aggregate 4,320-month (360-year) sentence for which Mr. Segars's eighteen counts of conviction make him eligible even under *Apprendi*. The court notes in passing that the sentencing factors to which the guidelines look need not be proven beyond a reasonable doubt to a jury as long as the maximum statutory sentence is unaffected. *See Hernandez v. United States*, 226 F.3d 839, 841 (7th Cir. 2000). U.S.S.G. § 5G1.2(d) provides:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment [as determined in accordance with U.S.S.G. § 3D1.4], then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

Under *Apprendi* and the sentencing guidelines, then, reference to the drug quantities doesn't increase Mr. Segars's maximum penalty – that could have been done through a jury verdict, in which event Mr. Segars might have faced a 550-year sentence (seventeen counts of consecutive thirty year sentences, plus forty more on the conspiracy count), but no such jury finding was made – but it governs the operation of the guidelines, reducing the court's sentencing options from a statutory range of zero to 4,320 months' imprisonment to a guideline range of 262 to 327 months' imprisonment.

To the extent Mr. Segars's sentence consists of concurrent 315-month sentences, his petition might be well-taken since *Apprendi* might limit the statutory maximum to 240 months (twenty years) per count. If so, however, the proper remedy would appear to be a sentence modification to make 75-month sentences on one or more counts run consecutively to 240-month sentences on other counts, leaving Mr. Segars's aggregate sentence undisturbed. *See, e.g., United States v. Page*, 232 F.3d 536 (6th Cir. 2000). The time for mathematical correction has passed; relief under § 2255 is reserved for error of constitutional magnitude, *see Marx v. United States*, 930 F.2d 1246, 1250 (7th Cir. 1991), and Mr. Segars has not shown such error.

In short, the court is less certain than are Mr. Segars and the government that this petition is properly before this court, but Mr. Segars is not entitled to relief in any event because even if *Apprendi* applies to Mr. Segars's case, it does not affect the constitutionality of his sentence. The court DENIES the motion attacking sentence pursuant to 28 U.S.C. § 2255 (filed November 2, 2000).

SO ORDERED.

ENTERED: January 11, 2001

/s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States
District Court

cc: J. Segars
B. Brook

APPENDIX C

United States Court of Appeals
For The Seventh Circuit
Chicago, Illinois 60604

August 31, 2001

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

No. 01-1251

JAMES C. SEGARS, *Petitioner-Appellant,* *v.* UNITED STATES OF AMERICA, *Respondent-Appellee.*	Appeal from the United States District Court for the Northern District of Indiana South Bend Division No. 00 C 681 Robert L. Miller, Jr. *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by plaintiff-appellant in the above-entitled cause on August 13, 2001, no judge in active service has requested a vote on the suggestion for rehearing *en banc*, and all of the judges on the original panel have voted to deny the petition for rehearing.

Accordingly, the petition for rehearing with suggestion for rehearing en banc is therefore DENIED.

APPENDIX D

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 20, 2000
Decided September 26, 2000

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

No. 003442

JAMES C. SEGARS,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

On Motion for an Order Authorizing the District Court to Entertain a Second or Successive Motion for Collateral Review

ORDER

James Segars has applied for an order pursuant to 28 U.S.C. § 2244(b)(3) authorizing the district court to consider a second or successive motion under 28 U.S.C. § 2255. Segars, however, does not need this court's permission to file another collateral attack. He obviously assumes that he must count his original motion to vacate under § 2255 as his first and this proposed motion as his second collateral attack. But Segars' first motion to vacate his sentence was granted and the district court imposed a new sentence. Since then, Segars has not collaterally attacked the new sentence. In other words, the motion to vacate he proposes in his application would actually be his first collateral attack on the new sentence. Under these circumstances, Segars need not obtain authorization

under § 2244(b)(3) to file his collateral attack. *See Shepeck v. United States*, 150 F.3d 800, 801 (7th Cir. 1998); *Walker v. Roth*, 133 F.3d 454, 455 (7th Cir. 1997).

Accordingly, we DISMISS as unnecessary Segars' application for leave to commence a successive collateral attack.

APPENDIX E

EXHIBIT 1

ADDENDUM to the PRESENTENCE REPORT
UNITED STATES v. JAMES CLETIS SEGARS
Docket No: SCR 91-2-1
United States District Court –
Northern District of Indiana

The Probation Officer certifies that on August 30, 1991, revised Presentence Report and this Addendum has been disclosed to Attorney Donald J. Berger and Asistant U.S. Attorney Joan Kouros and Barbara Z. Brook. A copy of this Presentence Report and Addendum were mailed to Attorney Berger for review with the defendant on August 30, 1991. The Addendum fairly states any objections made by either Attorney Berger or the Government.

OBJECTIONS

By the Government

Assistant U.S. Attorney Barbara Z. Brook has advised that she has no objections to the Presentence Report.

By the Defendant

I. Reference page 3, paragraph 12.

a. The defense objects and disputes the inclusion by inference, review, or attachment of the Government's Proffer pursuant to F.R.E. 801(d)(2)(E) to this Report due to the fact that the Government has had an opportunity to submit its version of the offense and the facts determinative of that offense have been heard at trial. Therefore, the evidence heard at trial and available for this Probation Report, is more pertinent to the subject of sentencing than the Government's Proffer.

b. The Government agrees with Defense Counsel Berger to the extent that the Pretrial Proffer was a submission to the Court for consideration in advance of actual trial. The Government maintains that the Proffer substantially mirrored actual testimony during the trial.

c. The Probation Officer maintains that the information supplied by way of Pretrial Proffer on the part of the Government is correct based upon extended discussions with Task Force agents who attended the trial.

II. Reference page 3 & 4, paragraph 17.

a. The defendant objects and disputes the computation of the amount of cocaine involved in this conspiracy for the reason that the computed amount from the Presentence Report of over 40-kilograms but less than 50-kilograms is computed to include the amount of cocaine testified by Government witness Salwan Asker, who is not a defendant in this case nor a co-conspirator, but testified to alleged criminal activity between himself and defendant's Emanuel Newman and Conchita Washington. Defense further contends that none of this activity was charged or evidence produced to substantiate these allegations but presumably was only offered as a pattern of criminal activity by an individual not part of this conspiracy, nor having any involvement with defendant James Segars, nor to show that Segars was in anyway involved or knowledgeable of that conspiracy or charged with that offense. This materially effects [sic] the computation of the Base Offense Level computed at 34 by the Probation Officer, wherein the defendant maintains that based upon the evidence at trial should set the Base Offense Level to as low a [sic] 26.

b. The Government indicates that Salwan Asker, is viewed as the unindicted co-conspirator in this case.

The Government and its investigators advised that Salwan Asker was Newman and Washington's supplier of cocaine during early 1988 to early 1989 and supplied them with 38-kilograms of cocaine. Further reports from the Government indicate that Gene Meert testified to receiving and running through the meat market at least one half pound of cocaine a week for a minimum of 5-months which would equal 10-pounds or about 4 and a half kilograms. Further evidence and testimony reveals that Newman and Washington told Salwan Asker they were moving cocaine to Indiana, because they were making a lot more money.

c. The Probation Officer has re-interviewed Task Force agents and is satisfied with the accuracy of the Government's statement as noted above. From all indications there was at least 42 and a half kilograms of cocaine involved in this case. The Probation Officer also believes that the inclusion of the total amount of cocaine connected with this case is provided for under 1B1.1(3)(a)(1), which states in part: ". . . . all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction." We also believe that under 1B1.3 Application Note 1, as well as Illustrations of Conduct for Which the Defendant is Accountable, paragraph a further gives reason and illustration for the inclusion of the 42 and a half kilos of cocaine.

III. Reference page 4, paragraphs 19 & 20.

a. The defendant disputes the Probation Officer's assessment that the defendant was a supervisor in this conspiracy. Defense contends that Mr. Segars is charged and has been convicted of possessing cocaine

with intent to sell. The facts alleged and evidence adduced was used as a basis for his conviction; therefore, to enhance his offense level computation by interpreting his selling of cocaine as a supervisor in the conspiracy would be duplicitous and an improper use of the Guidelines in determining the Offense Level.

b. The Government responds to the defense objection by indicating that Neal Winter, Bob Raabe, Monte Skeels, Craig Smith, Robert Segars, Donna Bryant, Phil Segars and Rose Henry were directly supervised by defendant James Segars.

c. The Probation Officer points to the Guidelines Part B-Role in the Offense introductory commentary wherein it states in part: "This part provides adjustments to the Offense Level based upon the role the defendant played in committing the offense. The determination of the defendant's role in the offense is to be made on the basis of all conduct within the scope of 1B1.3 (Relevant Conduct), i.e., all conduct included under 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the conduct of conviction."

Kespectfully submitted,

PAUL E. PANTHER,
CHIEF U.S. PROBATION OFFICER

by: /s/ Lon P. Smith
Lon P. Smith,
U.S. Probation Officer

Reviewed and Approved:

By: /s/ Joseph L. Wiley
JOSEPH L. WILEY,
SUPERVISOR

LPS:sl